MEWAH PLUS PROPERTY SDN BHD

v.

KLUANG DISTRICT GOVERNMENT SERVANTS CO-OPERATIVE HOUSING SOCIETY LTD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: J-02-814-97]
24 JANUARY 2000

CONTRACT: *Specific performance - Sale and purchase of property - Vacant possession - Subject property encroached upon by third party - Whether there was delivery of vacant possession - Failure by purchaser to pay balance sum - Whether a fundamental breach - Whether specific performance rightly refused*

By an agreement dated 11 July 1994 ('the agreement'), the appellant purchased a certain property from the respondent ('the property') and paid a 10% deposit therefor. A clause in the agreement stipulates that the respondent would undertake to remove any "encumbrances" over the property, and that the appellant was entitled to vacant possession thereof. Subsequently, the appellant discovered that the property had been encroached upon by the respondent's neighbour, and that being so, the appellant refused to pay the balance price contending that the encroachment had impeded the completion of the sale. The respondent took the view that "encumbrances" in the agreement did not include the alleged encroachment, and argued therefore that it could still complete the sale and deliver vacant possession of the property. The respondent in the circumstances gave notice to the appellant to pay the balance sum or suffer forfeiture of the 10% deposit. The appellant refused to comply, and applied instead for specific performance of the agreement. The learned judge ruled that the encroachment was no impediment to completion, that there was no breach of the agreement by the respondent, and that the respondent had therefore given vacant possession of the property. Specific performance was hence refused whereupon the appellant appealed.

Held:
Per Gopal Sri Ram JCA

[1] The word "encumbrances" in the agreement refers to some impediment in the registered title to the said property which prevents the registration of title from the respondent to the appellant. "Encumbrances" in the context of the agreement means an encumbrance in the National Land Code sense.

[2] The encroachment relied upon by the appellant is not an encumbrance envisaged by the parties in the agreement. It follows, therefore, that the parties, when making their agreement, did not make any provision for an encroachment on the said property. In any case, it was not the appellant's case in the court below that a term ought to be implied that the obligation to pay was to be suspended until removal of the encroachment. In the absence of such pleaded case, it is not the function of this court to imply such a term.

[3] The appellant's failure to pay the balance purchase price after having received the respondent's notice constituted a breach of contract. In an action for specific performance it is a defence to say that the plaintiff (the appellant here) was himself in breach. And since the appellant did not perform the fundamental terms of the contract, the learned judge was entitled to refuse specific performance.

[Appeal dismissed; order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Melalui perjanjian bertarikh 11 Julai 1994 ('perjanjian'), perayu membeli suatu hartanah dari responden ('hartanah') dan membayar 10% deposit baginya. Satu perenggan dalam perjanjian memperuntukkan bahawa responden akan mengalihkan apa jua "encumbrances" terhadap tanah, dan bahawa perayu berhak kepada milikan kosong hartanah. Perayu kemudian mendapati bahawa hartanah telah dicerobohi oleh jiran responden, dan dengan hal yang demikian, perayu enggan membayar baki harga belian sambil mengatakan bahawa pencerobohan tersebut telah menghalang pembelian dari disempurnakan. Responden berpendapat bahawa "encumbrances" di dalam perjanjian tidak merangkumi pencerobohan yang dikatakan itu, dan dengan itu berhujah bahawa ia masih boleh menyempurnakan penjualan dan memindahkan milikan kosong. Responden, dengan hal yang demikian, memberi notis kepada perayu supaya membayar baki harga atau deposit 10% berkenaan akan dirampas. Perayu enggan akur dan sebaliknya memohon untuk pelaksanaan spesifik. Hakim bijaksana

memutuskan bahawa pencerobohan bukan satu halangan kepada penyempurnaan, bahawa tidak terdapat kemungkiran di pihak responden, dan bahawa responden telah memberikan milikan kosong. Pelaksanaan spesifik telah dengan itu dibenarkan dan perayu merayu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Perkataan "encumbrances" dalam perjanjian merujuk kepada halangan-halangan tertentu kepada hakmilik berdaftar hartanah yang menghalang pendaftaran hakmilik dari responden kepada perayu. "Encumbrances" dalam konteks perjanjian bermaksud halangan di sisi Kanun Tanah Negara.

[2] Pencerobohan yang dikatakan perayu bukanlah halangan seperti yang dimaksudkan oleh pihak-pihak dalam perjanjian. Ianya mengikut bahawa pihak-pihak di sini, sewaktu memeterai perjanjian, tidak membuat apa-apa peruntukan bagi pencerobohan terhadap hartanah. Walau apapun, ianya bukan kes perayu di mahkamah dibawah bahawa suatu terma harus diandaikan bahawa tanggungan untuk membayar hendaklah digantung sehingga pencerobohan berkenaan dihapuskan. Dengan ketiadaan kes yang memplid sedemikian, ianya bukan tugas mahkamah untuk mengandaikan terma tersebut.

[3] Kegagalan perayu untuk membayar baki harga belian selepas menerima notis responden merupakan satu kemungkiran kontrak. Dalam tindakan pelaksanaan spesifik ianya adalah satu pembelaan untuk mengatakan bahawa plaintif (perayu di sini) sendiri yang berlaku mungkir. Dan oleh kerana perayu tidak melaksanakan terma fundamental perjanjian, hakim bijaksana berhak untuk menolak pelaksanaan spesifik.

[Rayuan ditolak; perintah sekadarnya.]

Case(s) referred to:
Associated Japanese Bank (International) Ltd v. Credit du Nord Sa [1988] 3 All ER 902 ***(refd)***
Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 ***(refd)***
Letchumanan Chettiar v. Palaniappa Chettiar [1983] 1 MLJ 6 ***(refd)***
Schuler AG v. Wickman Machine Tool Sales Ltd [1974] AC 235 ***(refd)***
Tan Ah Kian v. Hj Hasnan [1962] MLJ 400 ***(refd)***
Wong Kup Sing v. Jeram Rubber Estates Ltd [1969] 1 MLJ 245 ***(refd)***

For the appellant - Hilary D'Cruz (KK Low with him); M/s Low & Lee
For the respondent - Phang Weei Min (Gurucharan Singh with him); M/s Gurcharanpal Singh & Co

Reported by Nik Aras Yusoff

JUDGMENT

Gopal Sri Ram JCA:

This appeal raises, in our judgment, no matter of principle. It merely concerns a question of construction and the event of this appeal lies on the meaning to be assigned to the terms of an agreement for the sale and purchase of certain property.

The agreement in question is dated 11 July 1994. Under the agreement the appellant agreed to purchase the respondent's property held under Grant No. 8150, for Lot 2047, in the Mukim of Kluang, in area 6a. 1r 18p (hereinafter referred to as "the said property") for a sum of RM1,108,732.50. A deposit of 10% was paid upon the execution of the said agreement. Simultaneously with the execution of the said agreement, the respondent gave to the appellant a power of attorney also dated 11 July 1994. The purpose of the power of attorney was to entitle the appellant to enter upon the said property and commence earth works as well as to apply for various approvals to convert the said property from agriculture to residential tenure. It may be added in parenthesis that the appellant wanted to acquire the said property for the purpose of developing it into a housing estate.

Shortly after having entered upon the said property, the appellant discovered that there was an encroachment. It was the respondent's neighbour who had encroached onto the said property. The appellant took the position that the sale could not be completed and that it need not pay the balance of purchase price until the encroachment was removed. In adopting this stand, the respondent relied on the clause in the agreement that required the delivery of vacant possession. It may be added that under the terms of the balance of purchase price was payable on 2 October 1994 with a provision for extension on payment of interest at the rate of 10% per annum.

The respondent did not accept the position asserted by the appellant. It took the view that it could complete the sale and purchase of the subject property by delivering vacant possession. It said so in contemporaneous correspondence.

Despite the time limit imposed by the agreement neither side insisted on its due performance. Time was therefore allowed to pass. Time was therefore no longer of the essence. (See *Wong Kup Sing v. Jeram Rubber Estates Ltd*. [1969] 1 MLJ 245.) Then, on 3 November 1995, the respondent's solicitors wrote to the appellant's then solicitors a letter which contained the following paragraph:

> As the matter is long overdue, we are instructed by our client to give you a month from the date of receipt of this letter to pay the balance of the purchase price failing which (and time shall be of the essence) our client shall terminate the Sale and Purchase Agreement and forfeit the deposit sum paid.

In my judgment the paragraph I just quoted constitutes sufficient notice to the appellant to perform its obligation to pay the balance of the purchase price. See *Tan Ah Kian v. Haji Hasnan* [1962] MLJ 400 affirmed in [1963] MLJ 175.

Despite of the passing of time specified in the paragraph quoted above, the appellant did not pay. In support of his argument that the appellant was under no obligation to pay the balance of purchase price until the said encroachment was removed, Mr. Hilrary D'Cruz of counsel for the appellant drew our attention to and relied on two clauses in the sale and purchase agreement. These read as follows:

> **Clause 9**
>
> The Vendor/s shall secure the removal of all encumbrances (if any) and the discharge of all existing charge/s from the existing chargee/s described in Section 13 of the schedule hereto and or other charge/s(if any) at his/their own expense and costs over the said property through his/their Solicitors on or before the Date of Completion and the Vendor/s hereby authorises his solicitors and/or the purchaser/s solicitors to utilise such part as shall be required from the purchase price paid by the purchaser/s as redemption money for discharging the said charge/s over the said property. The redemption sum paid shall be treated as and deemed to be payment towards account of the purchase price.
>
> **Clause 10**
>
> In the event that the vendor/s fail/s and or neglect/s to remove the said encumbrances or if after the Date of Completion the Memorandum of Transfer cannot be registered in favour of the Purchaser/s and or his/their nominee/s or assign/s free from encumbrances for any reason whatsoever the Vendor/s shall at the request of the Purchaser/s and /or his/their/ nominee/s or assign/s forthwith refund and return all sums accepted and received by the Vendor/s towards the purchase price together with the further sum stated in Section 12 of the schedule hereto as liquidated damages whereupon this Agreement shall be treated as terminated but without prejudice to the right of the Purchaser/s and or his/their/nominee/s or assign/s to take steps to remove such encumbrances and to be reimbursed in respect of the expenses reasonably incurred by him/them.

The substance of the argument for the appellant turns upon the meaning to be given to the expression "encumbrances" appearing in the foregoing two clauses. Mr. D'Cruz has argued that it includes the encroachment that was allegedly found to exist in the present case.

With due respect to counsel for the appellant, we are unable to agree with his argument. In our judgment, the word "encumbrances" in the two clauses already quoted refers to some impediment in the registered title to the said property which prevents the registration of title from the respondent to the appellant. As was pointed out to counsel during argument, "encumbrances" in the context of the agreement in question means an encumbrance in the National Land Code sense. As to what amounts to an encumbrance in the context of the National Land Code, reference may be usefully made to two decisions of the Privy Council on the point.

The first is *Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267, where Lord Diplock when delivering the advice of the board said (at p. 269):

> In the National Land Code it is s. 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. **If registered they would amount to encumbrances within the meaning of a covenant against encumbrances**; but unless registered they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by their Lordships in the recent case of *Eng Mee Yong & Ors v. V Letchumanan* [1979] 2 MLJ 212, to which reference may conveniently be made.

The second is *Letchumanan Chettiar v. Palaniappa Chettiar* [1983] 1 MLJ 6, where (at p. 9) Lord Templeman referred to a caveat upon the register as "the only relevant encumbrance", thereby rendering a wider meaning to that expression than that given it by Lord Diplock in *Damodaran v. Choe Kuan Him (ibid)*.

The encroachment relied upon by the appellant in the present instance is not an encumbrance envisaged by the parties in the sale and purchase agreement. It follows that the parties when making their agreement did not make any provision for an encroachment on the said property.

It was not the appellant's case in the court below that a term ought to be implied that the obligation to pay was to be suspended until removal of the encroachment. In the absence of a pleaded case to that effect, it is not the function of the court to imply such a term. See *Associated Japanese Bank (International) Ltd. v. Credit du Nord Sa* [1988] 3 All ER 902.

Mr. D'Cruz responded by suggesting that the meaning which should be given to the term "encroachment" by reference to the subsequent conduct of the parties. He has referred to the correspondence passing between the appellant's and the respondent's solicitors after the execution of the agreement. He says that if one should look at the correspondence one can see that the expression "encumbrance" includes "encroachment".

The short answer to this submission is that the agreement has to be interpreted in accordance with the language employed by the parties to express their intention. Resort should not be had to subsequent conduct to interpret an agreement. Were it otherwise, an agreement would mean one thing today and another thing tomorrow. In support of this view we rely on *Schuler A.G. v Wickman Machine Tool Sales Ltd.* [1974] AC 235, where Lord Wilberforce said (at p. 261):

> The first qualification involves the legal question whether this agreement may be construed in the light of certain allegedly relevant subsequent actions by the parties. Consideration of such actions undoubtedly influenced the majority of the Court of Appeal to decide, as they did, in the respondent's favour: and it is suggested, with much force, that, but for this, Edmund Davies, LJ would have decided the case the other way. In my opinion, subsequent actions ought not to have been taken into account. The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive. As to statements during negotiations this House has affirmed the rule of exclusion in *Prenn v. Simmonds* [1971] 1 WLR 1381 as to the subsequent actions (unless evidencing a new agreement or as the basis of estoppel) in *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd*. [1970] AC 583.

In a latter passage Lord Wilberforce reiterated the position (at p. 262):

> In my opinion, therefore, the subsequent actings relied upon should have been left entirely out of account: in saying this I must not be taken to agree that the particular acting relied on are of any assistance whatever towards one or other construction of the contract. Indeed if one were to pursue the matter, the facts of the present case would be found to illustrate, rather vividly, the dangers inherent in entertaining this class of evidence at all.

The learned judge in the present case came to the conclusion that there was no breach of the agreement on the part of the respondent. In doing so he accepted that vacant possession had been given and that the encroachment complained of was no impediment to completion. Mr. D'Cruz said that the learned judge was wrong because he preferred the evidence of the respondent without giving reasons for the choice he made. In our judgment, a trial judge is entitled to accept evidence adduced by one party in preference to another party. And no duty is cast upon a trial judge to give reasons for his preference especially in a case which turns upon opinion evidence.

In this case the learned judge did not err in arriving in his conclusion. He was entitled to express his view on the evidence given by a party to the proceedings. At the end of the day whether the appellant is entitled to withhold payment of the balance of purchase price depends upon whether that obligation hinged upon the performance of some other obligation on the part of the respondent. We find no such provision in the agreement which imposes an obligation upon the respondent the non-performance of which excuses the payment of balance of purchase price in the context of arguments advanced by the appellant in this appeal. Put in another way, the appellant failure to pay the balance of purchase price after having received the respondent's notice constituted a breach of the contract. In an action for specific performance it is a defence to say that the plaintiff (the appellant in the present instance) was himself in breach.

Since the appellant did not perform the fundamental terms of the contract, the learned judge was entitled to refuse specific performance. We therefore affirm the reasons and order made by the learned judge.

The appellant must pay the costs of this appeal. The deposit paid into court shall go to the respondent to account of its taxed costs.